

Supreme Court, U. S.  
**FILED**

**JUN 9 1977**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1976

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**No. 76-5856**  
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**WINSTON M. HOLLOWAY, et al.,**

*Petitioners,*

v.

**STATE OF ARKANSAS,**

*Respondent.*

\_\_\_\_\_  
ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF ARKANSAS  
\_\_\_\_\_

**BRIEF FOR PETITIONERS**  
\_\_\_\_\_

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(i)

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BRIEF FOR PETITIONERS

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**OPINION BELOW**

The opinion of the Supreme Court of Arkansas (Pet. App. A) is reported at 539 S.W.2d 435.

**JURISDICTION**

The opinion of the Supreme Court of Arkansas was rendered July 19, 1976. That Court entered final judgment upon denying rehearing September 20, 1976 (Pet. App. C). The jurisdiction of the United States is invoked under 28 U.S.C. 1257(3).

### QUESTION PRESENTED

The three defendants were each charged with one count of robbery and two counts of first degree rape. The Public Defender was appointed to represent the three defendants, and after talking to each defendant individually, filed a motion for a severance and a motion for separate counsel due to a possible conflict of interest. The trial Court overruled the motions and ordered the Public Defender to represent the three defendants in the same trial over their objections.

The question presented is whether the three defendants were denied effective assistance of counsel by the order of the trial court appointing the Public Defender to represent them in the same trial over their objections.

### CONSTITUTIONAL PROVISIONS INVOLVED

#### CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

#### CONSTITUTION OF THE UNITED STATES, SIXTH AMENDMENT:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . and to have the assistance of counsel for his defense.

#### CONSTITUTION OF THE UNITED STATES, FOURTEENTH AMENDMENT:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

### CONSTITUTION OF ARKANSAS, ARTICLE 2, SECTION 10:

In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed; . . . and to be heard by himself and his counsel.

### STATEMENT

Following a jury trial in the Circuit Court of Pulaski County, Arkansas, the petitioners were each convicted of one count of robbery and two counts of first degree rape. Each petitioner was sentenced to twenty-one years for robbery and two life sentences for rape. In a four to three decision, the Arkansas Supreme Court affirmed their convictions and sentences. (Pet. App. A; 539 S.W.2d 435).

In the early morning hours of June 1, 1975, the Leather Bottle Restaurant in Little Rock, Arkansas, was robbed by three men. During the course of the robbery, two of the waitresses were raped.

The defendants were arrested at different times and placed in separate line-ups at different times, and identified by the five witnesses who were in the Leather Bottle. One of the waitresses was raped once and the other one was raped twice. Defendant Holloway was identified by one of the waitresses as the man who raped her, but neither could identify the other man or if it was two different men (R. 145-148 and R. 201-203).

The Public Defender was appointed to represent all three defendants over his objections due to a possible conflict of interest. Each of the defendants filed a Motion for Severance (App. 7-9) and for separate counsel (App. 10). The Court denied their Motion for Severance and separate counsel (App. 11).

At the beginning of the trial, the Public Defender made the following oral motion:



(R. 121) MR. HALL: I have one other motion. Previously, I had filed a Motion and asked the Court to appoint separate attorneys for each defendant.

THE COURT: Yes, sir, and I refused to do it.

MR. HALL: At this time I would like to renew that Motion on the grounds that one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them.

THE COURT: I don't know why you wouldn't. Overruled. Save your exceptions.

Later in the trial and just before the defendants testified, the Public Defender again requested the Court to appoint separate counsel due to a possible conflict of interest.

(R. 237) MR. HALL: If the Court please, I talked to my three clients, the three defendants, this morning. I have received information from all three of them that they wish to testify.

THE COURT: And you have advised them of their rights and that they don't have to testify.

MR. HALL: I have advised them of their rights, that they have a right to testify or not to testify in their own behalf. Now, since I have been appointed, I had previously filed a motion asking the Court to appoint a separate attorney for (R. 238) each defendant because of a possible conflict of interest. This conflict will probably be now coming up since each one of them wants to testify.

THE COURT: That's all right; let them testify. There is no conflict of interest. Every time I try more than one person in this Court each one blames it on the other one.

MR. HALL: I have talked to each one of these defendants, and I have talked to them individually, not collectively.

THE COURT: Now talk to them collectively. Do you all want to testify?

DEFENDANT WELCH: Yes, we do, I do.

THE COURT: All of you want to testify? (All defendants nodded in the affirmative.)

THE COURT: You don't want to waive the privilege of not testifying? (All defendants responded in the negative.)

(239) THE COURT: You know what you are doing? (All defendants nodded in the affirmative.)

THE COURT: He's advised you that you have a right to testify or not to testify if you desire? (All defendants nodded in the affirmative.)

MR. HALL: I am in a position now where I am more or less muzzled as to any cross-examination.

THE COURT: You have no right to cross-examine your own witness.

MR. HALL: Or to examine them.

THE COURT: You have a right to examine them, but you have no right to cross-examine them. The prosecuting attorney does that.

MR. HALL: If one takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually.

THE COURT: Well, you have talked to them, I assume, individually and collectively, too. They all say they want to testify. I think it's perfectly alright for them to testify if they want to, or not. It's their business.

MR. HALL: Save my exceptions.

THE COURT: You are overruled.

During the Public Defender's direct examination of Defendant Welch, the following colloquy occurred when in response to a question, the Defendant Welch stated that he wasn't there (R. 255-256; App. 29-30):

DEFENDANT HOLLOWAY: Your Honor, are we allowed to make an objection?

THE COURT: No, sir, your counsel will take care of any objections.

MR. HALL: Your Honor, that is what I'm trying to say. I can't cross-examine them.

THE COURT: You proceed like I tell you to, Mr. Hall. You have no right to cross-examine your own witness anyhow.

The Court, by stating that the Public Defender had no right to cross examine his own witnesses prevented the Public Defender in this part from providing effective individual defenses to the co-defendants, Holloway and Campbell. This would apply to each co-defendant while one of the co-defendants testified. This was objected to by the Public Defender throughout the trial.

#### ARGUMENT

#### THE THREE DEFENDANTS WERE DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PUBLIC DEFENDER WAS APPOINTED TO REPRESENT THEM IN THE SAME TRIAL OVER THEIR OBJECTIONS.

Effective assistance of counsel is assistance untrammelled and unimpaired by court order requiring that one lawyer shall simultaneously represent conflicting interests; and if counsel must represent conflicting interests or is ineffective because of the burden of representing more than one defendant, the injured defendant has been denied his constitutional right to effective counsel.

The Sixth Amendment right to effective assistance of counsel includes the right to a lawyer who is not obliged to serve conflicting interests at the same time.

In the present case, the defense counsel filed a Motion for Severance and a motion for separate counsel which were denied by the Court. Further, when defense counsel was examining one of the defendants (App. 29-30) a co-defendant asked if he could make an objection to which the Court replied "No, sir, your counsel will take care of any objections." It is unheard of for an attorney who is asking questions on direct examination of a witness, who is one of

his three clients, to "object" to his own question in behalf of one of the co-defendants.

In *Commonwealth v. Maroney*, 208 Pa. Super. 172, 220 A.2d 405 (1966), the Superior Court of Pennsylvania held that:

"If, in the representation of more than one defendant, a conflict of interest arises, the mere existence of such a conflict vitiates the proceedings, even though no actual harm results, rather than that such harm did result, furnishes the appropriate criterion." *Commonwealth ex rel. Whittling v. Russell*, 406 Pa. 45, 176 A.2d 641 (1962).

In *State v. Montgomery*, 182 Neb. 737, 157 N.W.2d 196 (1968), the Court held that single counsel could not, at a joint trial, effectively serve the interests of two co-defendants where the confession of one was admitted into evidence putting the entire responsibility for the alleged robbery on the other, even though the confessing defendant at trial repudiated this confession. The court, therefore, reversed the robbery conviction of the inculpatated defendant.

In *People v. Chacon*, 73 Cal. Rptr., 447 P.2d 106 (1968), in a prosecution of four defendants jointly charged, as life prisoners, with malicious assault with a deadly weapon on a fellow convict, the refusal of the trial judge to provide separate counsel for each of the three defendants actually convicted, deprived them of the right to effective assistance of counsel and required reversal of the judgments as to both guilt and penalty, where at no time did the court indicate to these defendants that separate counsel might be appointed for each of them, where their only choice was to accept one attorney for all or proceed without an attorney, and where, although a common defense was presented by counsel representing all three defendants and the record was silent as to evidence that might have been developed on behalf of each if separately represented, the facts of the case were fraught with potentially effective individual defenses which could not be presented by counsel common to all three.



In *State v. Brazile*, 226 La. 254, 75 So.2d 856 (1954), the court reversed and remanded a first degree murder conviction because the trial court failed to appoint separate counsel for each of the co-defendants, where the appointed counsel had argued to the trial court that he was unable to represent both accused to the degree of efficiency required in a capital case in that he was unable to plead mitigation of one defendant for fear of prejudicing the other.

The Supreme Court of Illinois held in *People v. Johnson*, 46 Ill.2d 266, 265 N.E.2d 869 (1970), that where a Public Defender was appointed to represent defendant and two co-defendants did not object to dismissal of charges and entry of an immunity order as to one co-defendant, who went free and subsequently testified against defendant, defendant did not receive effective assistance of counsel because of a conflict of interest; the conviction was reversed and a new trial ordered.

In the present case the Public Defender could not cross-examine any of the three defendants because he was under a duty not to disclose information given him by them under the attorney-client relationship.

In the case of *People v. Halluin*, 36 Ill. App.3d 556, 344 N.E.2d 579 (1976), the Court held:

"Where co-defendant pled guilty and was sentenced, and then appeared as sole witness directly placing defendant at scene of crime, and where attorney representing both defendant and co-defendant did cross-examine the co-defendant and generally impugned his credibility in closing argument, but cross-examination appeared less than thorough, joint representation involved conflict of interest, there being a duty on part of attorney not to disclose statements given to him by co-defendant in context of their attorney-client relationship, and reversal was required.

In the present case the Public Defender talked to each one of the defendants individually (App. 22-23) and therefore any statements made by them were confidential between the attorney and client. In the case of *Olds v. State*, Fla. App.,

302 So.2d 787 (1974), the Public Defender was summarily found to be in contempt of court in attempting to cross-examine State's witness who had previously been represented by Public Defender's office and had pled to reduced charge in same homicide where subject matter of attempted cross-examination included statements made by witness in presence of third parties and matters of public record. In reversing the contempt of court adjudication, the Court held that confidentiality rights may be waived by making them in the presence of third parties or they are a matter of public record. The Court went on to say that where the witness had privately given the Public Defender damaging information which he would be required to elicit in the instant trial, it would obviously be a conflict which would not be countenanced.

The Court of Appeals of Kentucky held in *Maynard v. Commonwealth*, 507 S.W.2d 143 (1974), that the refusal to appoint separate counsel to represent three co-defendants, after their appointed attorney stated that they had antagonistic defenses, was reversible error.

Ours is an adversary system of justice. To make such a system work, the adversaries must approach the trial as equals. This can only be achieved by competent counsel armed with the weapons of law to meet the State's weapons of superior manpower and funding.

To be properly armed, the attorney must be fully appraised of the facts upon which his client's case is based. The client must be able to freely disclose those facts without fear of his counsel cross-examining him with it for the benefit of a co-defendant.

The attorney-client privilege is of ancient origin and is fundamental to all other Constitutional protections afforded the defendant charged with a crime. Were there no confidentiality between attorney and client, the defendant would be at the mercy of the State, unable to adequately defend himself alone, but equally unable to confide in an attorney for fear that any information divulged to that

attorney would be used against him on cross-examination by his attorney who would be representing a co-defendant. Placing the defendant in such a position is abhorrent to our concepts of due process and justice under law.

The American Bar Association's approved draft on Standards Relating to the Prosecution Function and the Defense Function published by the Institute of Judicial Administration states in the Defense Function, Section 3.5(b):

"... The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the defendants give an informed consent to such multiple representation."

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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